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No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

OLD COLONY TRUST COMPANY, as Trustee, *Appellant*,

—vs.—

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County, *Appellees*.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. EDWARD E. CUSHMAN,
United States District Judge

SUPPLEMENTAL MOTION TO DISMISS APPEAL

EWING D. COLVIN,
HOWARD A. HANSON,
Solicitors for Appellees, County of King, W. W. Shields, as Treasurer of King County, Matt Starwich, as Sheriff of King County,
431 County-City Building,
Seattle, Washington.

THOMAS J. L. KENNEDY,
GEORGE A. MEAGHER,
Solicitors for Appellee, The City of Seattle,
527 County-City Building, Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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SUPPLEMENTAL MOTION TO DISMISS APPEAL

Not waiving their original motion to dismiss the appeal herein, appellees hereby move this court to dismiss the appeal as to them, and each of them, for the following reasons:

I.

That because appellant has assigned all its right, title and interest in the subject matter of the above entitled suit to the Puget Sound Power & Light Company, a corporation, there is now no actual controversy involving real and substantial rights between the parties, and no subject matter upon which the judgment of this court can operate.

II.

That there is a defect of parties appellant in that it appears that the Puget Sound Power & Light Company, a corporation, is an indispensable and the real

party in interest herein, and is not a party appellant hereto.

This motion is based upon the records and files in the above entitled cause and the affidavit of George A. Meagher, Solicitor for Appellee, The City of Seattle, said affidavit being appended to this motion as Exhibit "A".

STATEMENT

Oral argument herein was had on March 5, 1926. Since that date the case of "*Puget Sound Power & Light Company*, a corporation, Plaintiff, *v. The City of Seattle*, a municipal corporation, Defendant," being Cause No. 404—In Equity, in the District Court of the United States for the Western District of Washington, Northern Division, came on for trial on the merits, upon the conclusion of which trial the District Court rendered its decision in favor of plaintiff and against defendant for three-fourths of the principal and interest of the street railway tax for 1919, being the tax involved in the above entitled proceedings.

During the progress of such trial, Mr. George A. Meagher, counsel for defendant, The City of Seattle, in that cause and in the case at bar, urged that the plaintiff in such cause was not entitled to maintain its action in the District Court, since the Old Colony Trust Company, as Trustee, had a suit pending in the United States Supreme Court in which it claimed to have paid part of this tax and interest and was litigating its claimed rights thereunder (p. 14).

Mr. James B. Howe, counsel for plaintiff, Puget Sound Power & Light Company, in the case in the District Court and counsel for appellant in the case at bar, thereupon stated in open court that the Old Colony Trust Company as Trustee, had assigned to said Power & Light Company all its interest in and claim to the recovery of any portion of said tax and interest and, hence that said Power & Light Company

was entitled to claim recovery for all of the three-fourths of the tax and interest under its contract with the City of Seattle for the purchase of the street car system. Mr. Howe, as attorney for said Power & Light Company, then on March 22, 1926, offered, and the court admitted in evidence, Plaintiff's Exhibits "9" and "10" in such cause (p. 15). These exhibits are set up as part of the affidavit of Mr. George A. Meagher in support of this supplemental motion to dismiss (See pp. 16-26 herein).

The tax was paid under protest on June 7, 1924. These Exhibits "9" and "10" disclose that negotiations between the Old Colony Trust Company, as Trustee, and the Puget Sound Power & Light Company, respecting their interests in the recovery of any portion of this tax, were concluded on July 1, 1924, culminating in the satisfaction of the mortgage upon which appellant relies in the case at bar and which is referred to on pages 4 and 5 of the printed record herein, and in the assignment referred to by Mr. Howe. Thereafter on September 8, 1924, the petition for appeal herein was filed (R. 22).

Exhibits "9" and "10" thus show that since July 1, 1924, the Old Colony Trust Company, as Trustee, has had no interest in the subject matter involved in the above entitled cause; that there is now no controversy involving real and substantial rights between the parties hereto and no subject matter upon which the judgment of this court can operate. Also that since such date the Power & Light Company has

been the real party in interest. Hence it has been waging two suits—one in its own name and one in the name of the Old Colony Trust Company, as Trustee, for the recovery from the City of Seattle of the same thing—three-fourths of the tax with interest. The suit in its own name has come on for trial on the merits in the District Court and a decision in its favor has been rendered against the City of Seattle for three-fourths of the tax and interest. Not only was a decision rendered, but on April 5, 1926, a final decree was entered in its favor in conformity with said decision (See Exhibit "2", attached to affidavit of George A. Meagher, pp. 26-30).

Whatever may be the outcome of that decree on appeal, if appealed, it clearly appears that in so far as the Puget Sound Power & Light Company is concerned, it has no right to prosecute the case at bar in its own name or in the name of the appellant herein. The other suit is pending between itself as plaintiff and the City as defendant, all other appellees being dismissed and the dismissal affirmed, involving the same subject matter and the same ultimate relief, namely; recovery from the City of Seattle of three-fourths of the tax with interest and subrogation to the tax lien to such extent.

For previous reported decisions in this District Court suit see

Puget Sound Power & Light Company v. Seattle, et al., 300 Fed. 441, also 443;

Puget Sound Power & Light Company v. Se-

attle, et al., (C. C. A.) 5 Fed. Rep. 2d Series, 393.

ARGUMENT

Under Equity Rule 37, the appeal at bar must be prosecuted in the name of the real party in interest.

In view of its assignment, the Power Company is an indispensable party hereto and its absence prevents the court from proceeding, except to dismiss.

Young v. Cushing, Fed. Cas. 18156;
Mechanics' Bank v. Seton, 1 Peters 299;
Mallow v. Hinde, 12 Wheat. 193;
Gregory v. Stetson, 133 U. S. 579;
Ribon v. Chicago, etc. R. Co., 16 Wall. 446;
Russell v. Clark, 7 Cranch. 69;
Barney v. Baltimore, 6 Wall. 280.

Within a week after the judgment on which this appeal is founded (R. 20) was entered by the District Court, the mortgage, on which appellant based its suit was satisfied, and appellant assigned any interest it had in the recovery of this tax to the Puget Sound Power & Light Company.

Appellant herein, in its supplemental bill (R. 13) alleged:

> "8. If the plaintiff by reason of such acts should be compelled to pay such taxes or any portion thereof, then the plaintiff should be subrogated to the lien of the State of Washington, the County of King, School District No. 1 and the City of Seattle for such taxes upon the street railway property of the City of Seattle upon which

such taxes are specific liens, and the City of Seattle should be compelled to pay its portion of all of such taxes to the plaintiff in accordance with the contract between the City and the Company."

Whatever may have been the extent of its contribution to this tax payment, the Power Company within a month reimbursed it and also paid off the mortgage itself.

It now appears that it is the Power Company which in reality perfected and prosecuted this appeal. Yet all the while it had a separate suit in its own name against the City of Seattle to recover three-fourths of the tax and interest and to be subrogated to such extent to the tax lien.

In its original bill against the City, the Power Company prayed (300 Fed. 446):

"' * * * that the plaintiff have a decree against the city requiring it to repay to the plaintiff forthwith three-fourths of the amount of such taxes, with interest and costs, and that the defendant be subrogated to the lien of such taxes upon the street railway property of the city of Seattle'."

After the original bill had been dismissed on motion, and the tax had been paid, the Power Company filed an amended and supplemental bill against the City alone alleging (5 Fed. Rep. 2d Series 395):

" * * * that the company and the Old Colony Trust Company, mortgagee trustee, had

paid in full the taxes upon the street railway property for the year 1919, with interest and costs, in order to save and protect the other property of the company levied upon by the sheriff under and by virtue of the distress warrant, and asked, in addition to the other relief sought, that the company be subrogated to the lien of the taxes on the street railway property."

The decree entered April 5, 1926 (pp. 26-30) is upon this amended and supplemental bill and is for $545,370.23, which sum the decree recites

> " * * * is the portion of the taxes for the year 1919 upon such property subject to which the defendant purchased the property from the plaintiff and which defendant assumed and agreed to pay, together with interest thereon and the Sheriff's costs of collecting the same."

and further that

> "The plaintiff is subrogated to the lien of the State, the County of King, School District No. 1 and City of Seattle taxes for the year 1919 upon such property to the extent of such portion with interest thereon and sheriff's costs of collection with interest, amounting to the total sum of five hundred forty-five thousand, three hundred and seventy dollars and twenty-three cents ($545,370.23), with interest from this date on such sum until paid."

Since July 1, 1924, the Power Company has been the sole party in interest in this tax controversy. On

May 18, 1925, the Circuit Court of Appeals denied the City's petition for rehearing (5 Fed. Rep. 2d Series 393). Since that time the Power Company has had a clear right to a hearing on the merits on its entire claim to recover from the City three-fourths of the tax and interest and for subrogation. Yet after that date, and on September 29, 1925, appellant's brief herein was served on appellees and subsequent proceedings were had herein including hearing on the appeal.

This court, with appellate jurisdiction only, cannot substitute the Power Company for the Trust Company, since that would be an exercise of original jurisdiction.

U. S. ex rel. Lewis v. Boutwell, 17 Wall. 604.

Only a party to the suit is entitled ordinarily to appeal.

Ex Parte Cutting, 94 U. S. 14;
Ex Parte Cockcroft, 104 U. S. 578;
In Re Woerishoffer, 74 Fed. 915;
Guion v. Liverpool, etc. Co., 109 U. S. 173.

If the Power Company had sought to appeal this case in its own name and interest, it should have set up the facts in a petition for appeal, praying for an order of intervention allowing it to become a party for the purpose of appeal.

Davis v. Merc. Trust Co., 152 U. S. 590.

This the Power Company had ample time to do since its assignment was dated only five days after the date of the judgment appealed from (R. 20). Such inter-

vention, however, rests within the discretion of the court, and if the petition is refused *mandamus* will not lie.

In Re Columbia Real Estate Co., 112 Fed. 643.

The appeal should be dismissed.

San Mateo County v. So. P. R. Co., 116 U. S. 138;

California v. San Pablo & T. R. Co., 149 U. S. 308;

East Tennessee V. & G. R. Co. v. So. Teleg. Co., 125 U. S. 695;

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Cheong Ah Moy v. U. S., 113 U. S. 216;

Allen v. Georgia, 166 U. S. 138;

Kimball v. Kimball, 174 U. S. 158;

Mills v. Green, 159 U. S. 651.

Respectfully submitted,

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HOWARD A. HANSON,
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THOMAS J. L. KENNEDY,
GEORGE A. MEAGHER,
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